him. He takes subject to the same equities as affected the property in the bankrupt's hands. In *Ex parte Hothausen* (2) a trustee was ordered to sell a house the title deeds of which had been deposited with a creditor by the bankrupt and to pay the proceeds to the creditor. In this case S & Co. merchants in London and Shanghai deposited title deeds to a house in Shanghai for opening a credit of £5,000. No conveyances or memorandum of deposit were made at the British Consulate at Shanghai. In Prussian law the contract was binding personally on S & Co. but as the necessary formalities for perfecting the security had not been gone through the appellant had no mortgage or lien on the house. James L.J. on page 727 observed:—

". . . . and I myself do not believe that there is any law in any civilised country in the world which says that any party to such a contract properly evidenced is not bound by it. If that is so, the debtors were personally bound by the contract at the moment when their liquidation commenced. They ought to have fulfiled it; and that a bill could have been filed against them in this country to have compelled them to fulfil that contract is beyond all question. In this country, in an English bankruptcy the trustee stands exactly in the same position as the bankrupt himself stands in and therefore his trustee is bound to perform the contract in exactly the same way as he himself was bound to perform it."

and Mellish L.J. concurred with this view (p. 727) and added:—

". . . . and if it is personally binding then this court exercising the English Law of bankruptcy where the bankruptcy takes place will say that that which is personally binding upon the debtor is also binding upon his trustee."

I therefore take the view that there must be an order in terms of the summons. It has not been shown that there are express words in the statutes which preclude me from enforcing the equitable rights of the applicants. Under the bankruptcy law the trustee in bankruptcy is a statutory assignee who takes the bankrupt's property subject to the equities and liabilities which affect it in the bankrupt's hands at the time the bankruptcy was committed. See *Halsbury's* 3rd Edition Vol. 2 at p. 421 para. 838; *Das* "The Torrens System in Malaya" at page 192.

Therefore, *prima facie* the applicants who are prior in time must succeed unless it can be shown that he had relied on something tangible and distinct having grave and strong effect to accomplish the purpose: see *Shropshire Union Railway and Canal Co.* v. *The Queen.* (3) In the present case the substantial complaint against the applicants is that they had failed to register the caveat before the act of bankruptcy was committed. That, as has been perceptively said in the *Shropshire Union* case is not conduct of a character "which would operate and enure to forfeit and take away the pre-existing equitable title." The applicants had not parted with the documents of title. They retained possession of them all the time and it is open to them to register the caveat at any time. In my judgment, they had done nothing to forfeit their priority.

The Official Assignee's view is not correct, *Vallipuram's* case is against him. He forgets that independent of our land legislation our courts have always recognised equitable and contractual interests in land. See *Loke Yew* v. *Port Swettenham Rubber Co.* (4) See also section 206(3) of the National Land Code. The registration of the caveat does not confer priority nor does it create new right. It temporarily protects such rights in anticipation of legal proceedings. Taylor J. in *Wilkins* v. *Kannamal* (5) said:—

"The Torrens law is a system of conveyancing; it does now abrogate the principles of equity; it alters the application of particular rules of equity but only so far as is necessary to achieve its special objects."

See also *Das* "The Torrens System of Malaya" at pages 189-190, 196, 303.

I will hear arguments as to costs.

Application allowed.

Solicitors: *Skrine & Co.*

RE TAN TYE DECD.; BRITISH & MALAYAN TRUSTEES LTD. v. ESTATE & TRUST AGENCIES (1927) LTD.

[O.C.J. (Choor Singh J.) June 6, 1969]

[Singapore — Suit No. 2044 of 1964]

Trust and Trustees — Loss to estate — Alleged wilful neglect or breach of trust — Property subject to lease — Buildings on property belonging to tenant or sub-tenants — Apportionment of rent of land and buildings — Abandonment of counterclaim — Whether loss caused by defendants.

Landlord and Tenant — Property subject to lease — Expiry of lease — Lessee liable to pay profits — Mesne profits claimable when claiming for recovery of possession — Control of Rent Ordinance (Cap. 242), s. 15(1)(g).

In this case the plaintiffs, the present trustees of the estate of Tan Tye deceased, claimed a declaration that the defendants, who were the former trustees, were liable to make good to the estate the loss suffered by the estate by reason of the wilful neglect or breach of trust on the part of the defendants. The property subject to the trust was land used as the Happy World Amusement Park. This had been leased for a term of years expiring on the May 31, 1957. Under the lease the rent was to be at an increasing rate rising up to $800 a month. Under the term of the lease the tenant was permitted to erect buildings. The tenant erected on the land or caused to be erected buildings thereon by sub-tenants. In 1955 the lessee instituted proceedings against the defendants, as trustees of the estate, for a declaration that the lands and buildings

thereon constituted "premises" within the definition of that word in the Control of Rent Ordinance, 1953 and that the defendants were not entitled to recover higher rent other than the standard rent and therefore should refund the rent in excess received by them under the lease. The defendant counterclaimed for possession of the lands and buildings on the ground *inter alia* that the lessee as a tenant had sublet the lands and buildings and received in respect of such subletting rent which exceeded in the aggregate 110 per cent of the recoverable rent paid by the tenant. In 1958 judgment was given in favour of the lessee and the estate had to refund the sum of $10,000 being rent which the tenant had paid in excess of the standard rent; the counterclaim was abandoned by the defendants. Thereafter the lessee/tenant paid $500 a month as the standard rent and the defendants took no further action against the lessee. In 1961 the defendants were removed as trustee and the plaintiffs were appointed in their place. In 1961 the plaintiffs instituted proceedings against the lessee/tenants and were successful in recovering possession of the lands and buildings. It was argued that the defendants had committed a breach of trust by abandoning the counterclaim for possession and that by their failure to evict the tenant they had caused loss to the estate.

Held: (1) in 1956, when the lease had not expired, the buildings belonged to the tenant or sub-tenants, and as it would have been virtually impossible in this case to apportion the rent paid by the sub-tenants to the lessee between the land and the buildings. the counterclaim of the defendants would have failed and the defendants were wise in abandoning it;

(2) on the expiry of lease, the lessee became a trespasser and was liable to pay *mesne profits* and such *mesne profits* could have been claimed by the plaintiffs when they claimed possession of the premises in 1961;

(3) the loss suffered by the estate was not caused by the failure of the defendants and therefore they were not liable to make good such loss.

Cases referred to:—

(1) *Re Tan Tye decd.* [1966] 2 M.L.J. 107.

(2) *Kwek Kim Hock* v. *Ong Boon Siang* [1954] M.L.J. 253.

(3) *Chidambaram* v. *Nair* [1964] M.L.J. 370.

(4) *Syed Ahmed bin Alwee Al-Junied & Ors.* v. *Reshty* [1969] 1 M.L.J. 87.

CIVIL SUIT.

N.A. Mallal (*Y.R. Jumabhoy* with him) for the plaintiffs.

G. Starforth Hill (*P. Selvadurai* with him) for the defendants.

Cur. Adv. Vult.

Choor Singh J.: In this suit, the plaintiffs who are the present trustees of the Will and Estate of the abovenamed Tan Tye deceased, claim a declaration that the defendants, who were the former trustees of the said estate, are liable to make good to the estate of the said deceased all loss which the estate has suffered by reason of the wilful neglect or breach of trust on the part of the defendants and they also claim certain other consequential orders.

The facts are these. The plaintiffs are and have been since 24th February, 1961 the sole trustee of the trusts of the will of the abovenamed Tan Tye deceased which trusts are hereinafter called "the said trusts". The defendants are professional trustees and were at all material times up to the 24th February, 1961 the sole trustee of the said trusts.

At all material times the property subject to the said trusts included two pieces of land in Singapore known as Lots 354-4 and 356-1 of Mukim XXV which had been let by an indenture of lease dated the 5th August, 1936 for a term to expire on the 31st May, 1957. By an indenture of assignment dated the 2nd October, 1936, the lessee assigned the entire residue of the term created by the said lease to Happy World Ltd. (hereinafter called "the tenant"). The rent reserved by the said indenture of lease in respect of the said two pieces of land was as follows:—

(1) $100 monthly during the first ten months of the said term.

(2) $450 monthly during the year next following the first ten months of the said term.

(3) $500 monthly during the four years next following.

(4) $600 monthly during the five years next following.

(5) $700 monthly during the five years next following; and

(6) $800 monthly during the last five years of the said lease.

Under the terms of the said lease the tenant was permitted to erect buildings on the said land so as to enable him to carry on the business of an amusement park and it was provided that at the determination of the said term the tenant would peaceably and quietly leave, surrender and yield up unto the lessors the said lands with all buildings and structures thereon. The tenant erected on the said two pieces of land or caused to be erected thereon by the sub-tenants thereof numerous buildings and structures such as restaurants, cinemas, a stadium, a dance-hall and other structures such as are commonly found in amusement parks and it is alleged by the plaintiffs that at the date of the expiry of the said term on the 31st May, 1957 the tenant was in receipt of approximately $30,000 a month as rent derived from the said buildings and structures, apart from income from the use of the stadium. The said amusement park was commonly known as "Happy World Amusement Park" and I shall hereafter refer to the said lands with the buildings thereon as "the said lands".

The tenant instituted proceedings in 1955 against the abovenamed defendants, being Suit No. 989 of 1955*, claiming:—

* [1958] M.L.J. 155.

(1) a declaration that the said lands and the buildings thereon constituted "premises" within the definition of that word in the Control of Rent Ordinance, 1953;

(2) a declaration that the defendants had never at any time been entitled to recover a higher rent in respect of the said premises other than the standard rent; and

(3) an order that the defendants do refund to the tenant all such sums which the tenant had paid the defendants as trustees of the estate of the testator in excess of the said standard rent.

During the course of the said proceedings one Tan Lian Chye, a beneficiary of the estate of the abovenamed Tan Tye deceased was added as a defendant. Both the defendants in the said proceedings counterclaimed for possession of the said lands on a number of grounds one of them being that the tenant had sublet a part of the said lands and premises and received in respect of such subletting rents which exceeded in the aggregate 110 per cent of the recoverable rent paid by the tenant, who, it was alleged was therefore in breach of section 15(1)(g) of the Control of Rent Ordinance, 1953. At the hearing of the said suit the defendants by their counsel informed the court that they would press their counterclaim only if the plaintiffs were successful on their claim and accordingly it was agreed by and between the parties and the court that the counterclaim would be heard after the decision on the plaintiffs' claim. After the plaintiffs and the defendants had closed their cases in respect of the claim and just before the judge reserved his judgment on the claim on the 1st July, 1957 the first defendant's counsel therein, that is to say, the counsel for the Estate & Trust Agencies (1927) Ltd. informed the court that he was not proceeding with the counterclaim. It is alleged by the plaintiffs that the defendants herein abandoned the counterclaim against the wishes of the said Tan Lian Chye who represented in the said proceedings the majority of the income beneficiaries of the estate. By a written judgment delivered on the 5th March, 1958 Tan Ah Tah J. (as he then was), made the declarations and orders prayed for by the plaintiffs and dismissed the defendants' counterclaim. In the result the testator's estate had to refund to the tenant a sum of $10,000 being rent which the tenant had paid in excess of the standard rent. Thereafter the tenant paid the sum of $500 a month as the standard rent of the said lands.

On the 24th day of February, 1961, by an order of court made in Suit No. 1559 of 1960 the defendants were removed from acting as the trustees of the will and estate of the deceased and the plaintiffs were appointed in their place as the trustees of the will and estate of the deceased. On the 24th July, 1961 the plaintiffs instituted proceedings against the tenant, being Suit No. 934 of 1961*, to recover possession of the said lands. In the statement of claim the basis of the claim was a notice to quit which expired on 30th November, 1958 and the plaintiffs sought possession on three grounds:—

(1) that the tenant had sublet a part of the premises and was receiving in respect of such subletting, rents which exceeded in the aggregate 110 per cent of the recoverable rent paid by the tenant;

(2) that the tenant in contravention of section 15(1)(d) of the Control of Rent Ordinance had used or permitted the use of the said premises for illegal purposes; and

(3) that the tenant was in breach of an obligation of the tenancy and accordingly section 15(1)(b) of the Control of Rent Ordinance applied.

The trial judge held that the tenant had received from the sub-tenants more than 110 per cent of the rent paid by the tenant; that from June to August 1957 a hall in the amusement park had been used as a common gaming house; and that accordingly the use of the park in furtherance of an unlawful purpose came within section 15(1)(d) of the Control of Rent Ordinance. The tenant was ordered to deliver up possession of the said lands to the plaintiffs. The plaintiffs obtained possession on 1st February, 1964 and on 6th February, 1964 they entered into an agreement with one Goh Eng Wah under which he was granted the right to collect admission fees to the amusement park and for that right he was to pay $5,500 per month to the plaintiffs who retained the right to collect rents from all stalls. On the 16th June, 1966 the plaintiffs entered into a second agreement with the said Goh Eng Wah and under this second agreement he was to pay the plaintiffs $7,300 per mensem for the right to charge admission fees and to collect rents from all stalls except rents of five premises mentioned in the agreement. This second agreement was approved by the High Court. The beneficiaries of the estate appealed against the decision of the High Court, but their appeal was dismissed by the Federal Court. See *Re Tan Tye decd.*[1]

The plaintiffs, having successfully evicted the tenant and having entered into an agreement with a licensee under which the estate receives considerable income from the use by the licensee of a portion of the said lands, now contend that it was greatly in the interests of

* [1963] M.L.J. 380.

the beneficiaries under the trust that the tenant should have been evicted from the said lands since the rents or profits obtained after eviction would have greatly exceeded the standard rent or the highest rent reserved under the said lease; that from 31st May, 1957, that is, from the day the lease expired, to 24th February, 1961, that is, up to the date on which the defendants were removed from acting as trustees, it was the continuing duty of the defendants to institute proceedings for eviction of the tenant on one or both of the grounds already mentioned; that in breach of such duty the defendants did not during the said period institute such proceedings or any proceedings against the tenant and that the defendants' failure to institute proceedings was a continuing default and breach of trust. The plaintiffs claim that by reason of the said default and breach of trust the estate of the deceased has suffered a loss of income amounting to no less than $5,500 a month for a period of 45 months, alternatively, for a period of 36 months, and they claim a declaration that the defendants are liable to make good to the estate of the deceased all loss which the estate has suffered by reason of the wilful neglect or breach of trust on the part of the defendants in not taking steps to evict the tenant from the said lands.

It was submitted that the defendants committed a breach of trust by abandoning the counterclaim for possession in Suit No. 989 of 1953 because when the counterclaim was made on 29th February, 1956 the defendants knew that the tenant had sublet and was receiving rents in respect of the sublettings in excess of 110 per cent of the rent paid by the tenant and consequently the counterclaim for possession would have succeeded. In my opinion this submission must fail. In 1956 the lease had not yet expired. The buildings on the leased land were erected by and belonged to either the tenant or the sub-tenants. Where land is owned by the lessor and the buildings on it by the lessee, to invoke the provisions of section 15(1)(g) of the Control of Rent Ordinance the lessor must be able to apportion the rent paid by the sub-tenants to the lessee between the land of which the lessor is the owner and the buildings of which the lessee is the owner. As this is something virtually impossible to do where there are a large number of buildings on the land, as in this case, the counterclaim of the defendants would have failed and the defendants were wise in abandoning it. See *Kwek Kim Hock* v. *Ong Boon Siang;*[2] and *Chidambaram* v. *Nair.*[3]

On the other hand, upon the expiry of the lease, the legal position underwent a complete change. On 31st May, 1957, the day the lease expired, all the buildings on the said lands became the property of the estate of the deceased and the defendants became entitled to invoke the provisions of section 15(1)(g) of the Control of Rent Ordinance upon proof that the tenant was receiving more than 110 per cent of the rent paid by the tenant to the defendants. In my opinion, upon the expiry of the lease, the tenant in this case was not entitled to the protection of the Control of Rent Ordinance because the tenant did not qualify as a statutory tenant under section 27 of the Ordinance. On the 31st May, 1957 when the lease expired, the tenant was not a person "who cannot by reason of the provisions of this Ordinance be deprived of such possession by his landlord." The tenant did not satisfy this condition because at the moment of the expiration of the lease the defendants were entitled to deprive the tenant of possession by reason of the Ordinance, namely, section 15(1)(g). Accordingly upon the expiry of the lease the tenant failed to qualify as a statutory tenant within the meaning of section 27; and became a trespasser, with the consequence that the tenant was liable on the authority of *Syed Ahmed bin Alwee Al-Junied & Ors.* v. *Muchool Khanum Reshty,*[4] to pay *mesne profits.*

It seems to me that the main question which I have to decide in this case is whether or not the estate has suffered any loss by the defendants' failure to evict the tenant upon the expiry of the lease, and if it has, then I must decide whether or not the defendants are liable to make good that loss.

The lease expired on 31st May, 1957 and the defendants were removed from acting as trustees on 24th February, 1961. It is clear therefore that when the defendants were removed from acting as trustees, the time for claiming *mesne profits* from the tenant had not yet expired because *mesne profits* are damages for the tort of trespass and an action founded on tort can be brought at any time within six years from the date on which the cause of action accrued. When the plaintiffs instituted Suit No. 934 of 1961 against the defendants on 24th July, 1961 to recover possession of the said lands they could have claimed and should have claimed *mesne profits* from the tenant as from 31st May, 1957 but they did not do so. Had they claimed *mesne profits* in that suit for the period during which the tenant was in possession as a trespasser, the estate would not have suffered any loss at all because the tenant in this case was clearly liable to account for *mesne profits* from 31st May, 1957 to the date on which he gave up possession.

A number of reasons have been advanced on behalf of the defendants as to why they did

not take steps during the relevant period to evict the tenant, but in my opinion it is unnecessary to consider these reasons. In my opinion the failure of the defendants in not taking steps between 31st May, 1957 and 24th February. 1961 to evict the tenant from the said lands did not cause any loss to the estate because it was open to the defendants to claim *mesne profits* within six years of the expiry of the lease and they may well have done so had they not been removed from acting as trustees before the said period of six years expired. The estate has certainly suffered a loss, but the loss has been caused, in my opinion by the failure of the plaintiffs to claim *mesne profits* in Suit No. 934 of 1961. In my judgment the loss to the estate has not been caused by the defendants and therefore they are not liable to make good such loss.

For the above reasons I hold that the plaintiffs are not entitled to the declaration which they seek and their claim is therefore dismissed with costs.

Claim dismissed.

Solicitors: *Mallal & Namazie; Rodyk & Davidson.*

IN RE LEN CHEE OMNIBUS CO. LTD. CHIN SOW LAN v. LEE CHEE OMNIBUS CO. LTD. & ORS.

[O.C.J. (Raja Azlan Shah J.) June 6, 1969]

[Kuala Lumpur — Originating Summons No. 42 of 1968]

Companies — Application for rectification of register — Discretion of court — Delay in bringing application — Laches — Companies Act, 1965, s. 162.

In this case the applicant applied for an order under section 162 of the Companies Act, 1965 that the register of members be rectified. The applicant claimed to be the registered owner of the disputed shares in the respondent company. In September 1957 she went to see a director of the company and informed him that she intended to give a power of attorney to her mother in relation to her shares. Subsequently the mother obtained a share transfer form and gave that to the director for the applicant to sign. The director then requested the applicant to sign the transfer form saying that it was to effect a power of attorney. It was only after the death of her mother in 1963 that the applicant discovered that her shares had been transferred to and registered in her mother's name. It was not till December 1968 that this application was made.

Held: (1) the court has a discretion to give a summary remedy under section 162 of the Companies Act, 1965, but would not normally entertain such an application if the facts are as in this case, complex and disputed;

(2) in this case the application was not made within a reasonable time after the applicant became aware of the facts entitling her to relief and the application must therefore be dismissed for laches.

Cases referred to:—

(1) *Re Stranton Iron and Steel Co.* (1873), L.R. 16 Eq. 559.

(2) *Re Russian Iron Works Co,* (1866), 1 Ch. App. 574.

(3) *Re Ruby Consolidated Mining Co.* (1924), 40 T.L.R. 488.

(4) *Re Greater British Proaucts Development Corporation* (1874), 9 Ch. App. 664.

(5) *Smith* v. *Clay* (1767), 3 Bro. C.C. 639n at 640n.

ORIGINATING SUMMONS.

Kirpal Singh Brar for the applicant.

A.A. Thomas for the 1st respondent.

K.L. Devasar for the 2nd, 3rd and 4th respondents.

Cud. Adv. Vult.

Raja Azlan Shah J.: This is an application by way of summons made under section 162 of the Companies Act, 1965 for an order that the register of members be rectified by deleting the name of Low Hon as holder of 20 shares in the respondent company and inserting therein the name of the appellant. The said company is the first respondent, the last three respondents are administrators of the estate of Low Hon, who was the applicant's mother.

The applicant in her affidavit stated that in 1953 she was the registered owner of the disputed shares in the respondent company. Some time in September 1957 she went to one Wong Ah Chiew who was a director of the respondent company and informed him that as she was leaving the country to settle down in Singapore, she intended to give her mother, Low Hon, a limited power of attorney, that is, to collect the monthly allowances and the dividends arising from her shares. The applicant's mother later obtained a share transfer form and gave that to Wong Ah Chiew for the applicant to sign. Wong Ah Chiew then requested the applicant to sign the transfer form saying that it was to effect a power of attorney to enable her mother to collect the monthly allowance and dividends. The applicant signed the transfer form thinking that it was merely to give a power of attorney to her mother. The mother was not present. It was only after the death of her mother in August 1963 that she discovered that her shares had been transferred to and registered in the mother's name.

Wong Ah Chiew in his affidavit deposed that the applicant saw him and informed him that she intended to leave Ampang to settle down in Singapore and that she intended to make provision for her mother. She intended to give her a power of attorney to enable her to collect the monthly allowances and the dividends from the shares. Later, the applicant's